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Supreme Court, U.S.
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No. 97-566

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GABRIEL RUBINSTEIN,

Petitioner,

v.

RAMAPO COLLEGE OF NEW JERSEY, EDWARD SAIFF, ROBERT A. SCOTT, JAMES KELLETT, ROBERT HATALA, AND EDWARD J. CODY.

Respondents.

On Petition for a Writ of Certiorari To The Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

Petitioner Gabriel Rubinstein ("Dr. Rubinstein"), a tenured Assistant Professor of Chemistry and Environmental Science on sick leave from his employment at Ramapo College's School of Theoretical and Applied Science, a State institution, seeks review of a decision by the Superior Court of New Jersey Appellate Division affirming dismissal of his Complaint for damages for his present neuropsychiatric disability, as well as other alleged injuries which he attributes to alleged wrongs committed against him by the College and five of its administrators from 1986 to 1990 (Petition for Certiorari, Appendix A, (hereinafter App.__)).

In January 1986, a secretary at Ramapo College made it known to the Director of Personnel that she objected to certain unwelcome notes and other attention from petitioner and wanted them stopped. The secretary never filed a formal complaint with the College against Dr. Rubinstein for sexual harassment and consequently the College took no action against him (Pa49, Pa52, Pa88).[1]

Instead, on December 7, 1988, Dr. Rubinstein filed a grievance with the College's Affirmative Action Office against the secretary, his Department supervisor and another faculty member alleging discrimination in treatment of promotion, harassment, retaliation for protesting employment practices and defamation of character based on disability (Pa40). The Affirmative Action Office eventually informed petitioner that the

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[1] Pa refers to the briefs and appendix filed by Petitioner Rubinstein in the Appellate Division.
Da refers to the briefs and appendix filed by the State, et al. in the Appellate Division.

incidents he had listed in his grievance "[did] not fall under the aegis of Affirmative Action." (Pa86).[2]

Dr. Rubinstein took sick leave the winter of 1988, returned to the College in April 1989, taught the remainder of the Spring 1989 semester, and absented himself the Fall 1989 semester. With the Spring 1990 semester scheduled to begin January 31, 1990, on January 19, 1990 he requested more sick leave beginning January 22, 1990 (Pa90-92). Then, January 21, 1990, in a meeting with the Vice President of Academic Affairs, he retracted his request for sick leave. Given the College's concern regarding his reliability, on January 23, 1990, he was ordered to submit to a medical/psychological examination (2T13).[3] On February 2, 1990, he was cleared to return to work and he returned to teach for about a three-month period (2T15). He stopped teaching after a summer 1990 laboratory class.

On September 10, 1990, Dr. Rubinstein applied for sick leave injury benefits pursuant to his union's Collective Bargaining Agreement with the College. This request was denied and no appeal was ever taken pursuant to N.J.S.A. 18A:6-26 and N.J.A.C. 9:2-6.2 et seq. (Pa94). In October 1990, Dr. Rubinstein took a leave of absence and has not returned to the College to teach in over seven years.

In November 1990, he filed three Claim Petitions with the New Jersey Department of Labor and Industry, Division of Worker's Compensation against the College. Claim No. 90-052435 claimed neuropsychiatric and other injury arising from events occurring on January 1986 from alleged "harassment and

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[2] Petitioner seeks to divide his 42 U.S.C. §1983 claim in two. Supposedly, events to this point in the chronology would become the "harassment" claim, and events that follow become the "suspension" claim.

[3] 2T refers to transcript of February 9, 1995 hearing before the Superior Court of New Jersey, Law Division motion judge.

false accusations." Claim No. 90-052431 claimed "further mental harassment" including allegations of mental instability. Claim No. 90-052423 claimed continued harassment and "whispering campaigns" which aggravated and exacerbated his psychiatric disabilities to the point where he allegedly became "totally disabled." (Da53-55). Dr. Rubinstein began receiving temporary disability worker's compensation from the State on February 16, 1991 and is collecting to this day.

On January 6, 1992, Dr. Rubinstein filed an action against, among others, the College and six individual defendants (including five of the present individual defendants) in the U.S. District Court for the District of New Jersey. Dr. Rubinstein filed the amended Complaint on February 13, 1992. (App. C at 12a fn. 2). The complaint asserted violations of 42 U.S.C. §§1981, 1983, 1985, 1986 and 1988, and violation of several New Jersey statutes (App. C at 14a). Dr. Rubinstein alleged that after he complained about poor working habits of the secretaries, one secretary complained of sexual harassment by him to the Director of Personnel. As a result of publication of this allegation to the college community, he alleged he was injured in his employment opportunities, good name, reputation and integrity. He alleged he had suffered emotional trauma, distress and depression resulting in his request for sick leave. When he sought to return to work, he was required to submit to a psychological examination (Pa92).

The federal claims were dismissed on August 18, 1992 by the Honorable Alfred J. Lechner, Jr., U.S.D.J. who granted the State's motion to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(6) for failure to state a claim upon which relief could be granted (App. C at 44a-45a). Because no other grounds for supplemental jurisdiction was alleged, the state law claims were dismissed without prejudice (App. C at 43a-45a).

Dr. Rubinstein did not appeal the District Court decision. Instead, on September 19, 1992, he instituted this state court

action alleging violations of 42 U.S.C. §1983, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. and various common law claims. On January 4, 1993, he filed an Amended Complaint that identified the same time period, the same incidents, the same respondents and the same cause of action as the federal action. The motion judge, in three separate orders, dismissed with prejudice all counts of the Amended Complaint, finding that the federal claims asserted in the state court action were barred by application of the entire controversy doctrine (1T22)[4] because they "derived from a single transaction or related series of transactions" (1T23).

On June 20, 1994, Dr. Rubinstein brought a Motion for Reconsideration. The motion was denied (Pa384). On May 15, 1995 he brought a Motion for Reconsideration to Vacate the Orders of February 9 and May 5, 1995 and on July 7, 1995 sought leave to amend his Amended Complaint to assert a new cause of action (Pa392). On July 14, 1995, these motions were denied (Pa392, Pa413).

Petitioner appealed each of these four Orders. On November 20, 1996, the Appellate Division issued an unpublished decision affirming the trial court's orders (App. A).

In its decision, the Appellate Division agreed with the motion judge's dismissal of the federal civil rights claims, including the 42 U.S.C. §1983 claim, differing only as to the appropriate preclusionary doctrine not the result. The Appellate Division held that the appropriate preclusionary doctrine was res judicata, not entire controversy, because the federal claims were not omitted from the federal action but were raised and disposed of in the federal action (App. A at 4a).

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[4] 1T refers to transcript of decision of June 9, 1994 of the motion judge.

Notice of Petition for Certification, filed December 5, 1996 with the Supreme Court of New Jersey, was denied on April 24, 1997. (App. D). A Motion for Reconsideration was denied on June 30, 1997. (App. E).

Dr. Rubinstein has been a tenured Assistant Professor of Chemistry and Environmental Science at Ramapo College since 1979 and continues to hold this position. No detenure action has been ever been instituted against Dr. Rubinstein at Ramapo College, nor has he ever been the subject of disciplinary action. However, he has chosen not to teach since October 1990.

SUMMARY OF THE ARGUMENT

Review by the Supreme Court of the United States is not warranted as application by the Superior Court of New Jersey, Appellate Division of res judicata as preclusionary doctrine is consistent with this Court's decisions. Since petitioner raised and had adjudicated his 42 U.S.C. §1983 claims in Federal District Court and failed to appeal the District Court's granting of the Fed. R. Civ. Proc. 12(b)(6) motion to the United States Court of Appeals for the Third Circuit, the New Jersey State courts properly ruled that he was barred from relitigating his §1983 claims in a second state court action.

ARGUMENT

THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE ALL ASPECTS OF THE 42 U.S.C. §1983 CLAIM WERE ADJUDICATED IN THE UNITED STATES DISTRICT COURT AND THE STATE COURTS PROPERLY BARRED RELITIGATING THIS CLAIM IN A SECOND ACTION.

Petitioner untimely and incorrectly seeks to divide his 42 U.S.C. §1983 claim in two - as a "harassment" claim and a "suspension" claim - to then argue that there was no final judgment in the District Court as to the "suspension" claim so as

to preclude relitigation of this claim in state court. This counters the single-strand analysis that led to the District Court judgment on the merits and the New Jersey Appellate Division's application of res judicata to bar relitigation of the identical claim. Because the State courts applied this preclusionary doctrine to this matter consistent with the teachings of this Court, there is simply no basis for further review by the Court.

Both petitioner's State Court Amended Complaint and his earlier federal complaint alleged a series of related events that all stem from an alleged sexual harassment of a Ramapo College secretary by Dr. Rubinstein. His 42 U.S.C. §1983 claims in both actions comprise the alleged harassment, his reactions to the allegation including his on-again off-again attendance record, respondent Ramapo College's requirement that he be examined by an independent doctor to determine his capacity to return to work, and his ultimate self-imposed withdrawal from his teaching responsibilities.

In its letter opinion dated August 18, 1992, the District Court addressed all aspects of the 42 U.S.C. §1983 claim, holding that Dr. Rubinstein had failed to state a claim upon which relief could be granted. Looking to Dr. Rubinstein's asserted rights under the First Amendment, the District Court found protected the right to criticize the work product of the secretaries of Ramapo College and complain about the safety of the science laboratories. However, the Court concluded that Dr. Rubinstein had failed to demonstrate that, as a consequence of his exercise of his First Amendment rights, he had been deprived of his protected property interest in his employment.

Next, the District Court addressed the Due Process claim. Dr. Rubinstein alleged that his reputation had been damaged as a result of the defamatory conduct of the College and that as a consequence of this conduct, he asserted that he had been deprived of his ability to work. The Court found that because Rubinstein's property interest in his occupation had not been

altered or extinguished, any injury to his reputation was actionable only under state defamation law. Paul v. Davis, 424 U.S. 693, 711-12 (1976), reh'g. denied, 425 U.S. 985 (1976)(App. C at 31a-32a).

In his Petition for Certiorari, Dr. Rubinstein seeks to define some deprivation of property interest. He claims that he was

> suspended from teaching in January 1990 without any notice, hearings, pay, or probable cause, [in retaliation for his] ongoing seeking redress since December 1989 of his previously filed grievances with the College's Affirmative Action Office's written policy and procedures, alleging, inter alia, defamatory handicap discrimination.
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> [Petition for Certiorari at 6].

The District Court emphasis on the fact that Dr. Rubinstein remains a tenured professor at the College underlies its judgment on the merits of the entire §1983 claim. Petitioner may not avoid his earlier judgment on the merits by merely concocting a purportedly new legal theory. Doe v. Allied-Signal, Inc., 985 F.2d 908, 913, (7th Cir. 1993). The fact is, however, there was no suspension or other loss of job. He was simply asked to undergo a medical exam as a condition of his employment..

The only viable issue, therefore, is whether the court below appropriately applied the preclusionary res judicata doctrine to bar reassertion of the 42 U.S.C. §1983 claim in subsequent state court action.

The trial court dismissed "all federal claims based on the U.S. Constitution and/or 42 U.S.C. §1983" as having been decided by the District Court decision. In so doing, it invoked the entire controversy doctrine, finding that the claims "derive from a single transaction or related series of transactions" and to the extent that any particular allegation was not previously set forth in the District Court, these allegations had been

"unfavorably withheld" and "all constitute related components. Blanchard v. Beech Concrete, 150 N.J. Super. 277, [375 A.2d 675] (App. Div. 1977)" (1T22-23).

The Appellate Division affirmed substantially for the reasons orally stated by the motion judge. While agreeing with the motion judge that the federal claims were precluded, it found inapposite the application of New Jersey's unique entire controversy doctrine because the federal claims had not been omitted from the federal suit but were in fact raised and disposed of in the federal action. (App. A at 3a, 4a). The Appellate Division held that "the appropriate preclusionary doctrine was not entire controversy but rather res judicata." In so ruling, the Appellate Division applied the New Jersey Supreme Court's ruling in Velasquez v. Franz, 123 N.J. 498, 506, 589 A.2d 143, 147 (1991). There, as the Appellate Division found, the Supreme Court acknowledged,

> the preclusive litigation of the merits may encompass judgments that do not pass directly on the substance of a claim. In Velasquez, the Court adopted the Restatement (Second) of Judgments §27, comment d (1982), holding that a dismissal under Fed. R. Civ. Proc. 12(b)(6) is an adjudication on the merits for res judicata purposes, unless the judge specifies that it is 'without prejudice' 123 N.J. at 507, 509. There was no such specification here. The allegations supporting the federal claims in the state court are essentially the same as those rejected as legally insufficient in the federal court. Velasquez requires application of res judicata to bar reassertion of those claims in this litigation. [App. A, at 4a].

The holding in Velasquez is consistent with decisions of this Court. Federal law determines the effects under rules of res judicata or claim preclusion of a judgment in Federal Court. Heck v. Humphrey, 512 U.S. 477, 498, fn. 9 (1994). Under res

judicata, a final judgment on the merits of the action precludes the parties or their privities from litigating issues that were or could have been raised in that action on the same cause of action. Federated Department Stores, Inc., v. Moitie, 452 U.S. 394, 398 (1981).

> The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits. See Angel v. Bullington, 330 U.S. 183, 190, 67 S. Ct. 657, 661, 91 L.Ed. 832 (1947, Bell v. Hood, 327 U.S. 678, 55 S.Ct. 773, 90 L.Ed. 939 (1946). [Moitie, 452 U.S. at 399, fn.3.]

In the Petition for Certiorari, Dr. Rubinstein introduces his dual-claim theory to overturn the state court decision. However, contrary to petitioner's claim for certiorari, neither the federal nor the State Court Amended Complaint separated the §1983 claims into distinct causes of action. From the beginning, petitioner never made "clear separations and discontinuities," Wright, Miller & Cooper, Federal Practice, §4409 at 73 (1996 Supp.) so as to signal separate causes of action. His 42 U.S.C. §1983 claims in both actions stretch from the alleged sexual harassment of a secretary to his withdrawal from teaching in 1990.

Petitioner cites with approval Commissioner of Internal Revenue Service v. Sunnen, 333 U.S. 591 (1948). That tax case involving income taxes in different years is clearly distinguishable. However, respondents agree with its understanding of the meaning and scope of res judicata:

> The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit

> and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. (citation omitted). The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.
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> [333 U.S. at 597].

The Appellate Division decision properly applied the principle of res judicata to petitioner's 42 U.S.C. §1983 claim in a manner consistent with prior United States Supreme Court decisions. For that reason, further review by this Court is unwarranted.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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